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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 638

CHENG FAN KWOK (A15 355 927),

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1967
CERTIORARI GRANTED JANUARY 29, 1968

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Relevant Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Case No. 16,005

DATE	FILINGS—PROCEEDINGS
1966	
June 24	Petition for Review of an Order of the Board of Immigration Appeals, filed. (6 copies) Proof of service in letter of June 23, 1966.
	Copy of Petition for Review mailed to Attorney General of the United States.
	Copy of Petition for Review mailed to District Director of Immigration & Naturalization Service at Philadelphia, Pa.
Aug. 5	Certified Administrative Record, filed. (rec'd. from U. S. Attorney's Office in Philadelphia, Pa.).
1967	
Jan. 5	Brief and appendix for petitioner, filed. (4 copies).
Feb. 3	Brief for respondent and appendix, filed. (4 typed copies). Proof of service in letter of 2/7/67.
Mar. 3	Motion by respondent for leave to file supplemental brief, filed. (1 copy). No objection by opposing counsel in letter of 3/3/67.
Mar. 9	Order (*McLaughlin*, Hastie and Freedman, Circuit Judges) granting respondent's motion for leave to file supplemental brief on or before March 17, 1967, filed.

Relevant Docket Entries

DATE	FILINGS—PROCEEDINGS
1967	
Mar. 16	Supplemental Brief for Respondent, filed.
Mar. 20	Argued. Coram: Staley, Chief Judge and Kalodner and Smith, Circuit Judges.
Aug. 4	Opinion of the Court (*Staley,* Chief Judge and Kalodner and Smith, Circuit Judges), filed. (Covers.16005 and 16027).
Aug. 4	Judgment dismissing the petition for review of the decision of June 20, 1966 of the Immigration and Naturalization Service for lack of jurisdiction, filed.
Sept. 1	Order (*Staley,* Chief Judge) staying issuance of the mandate until September 18, 1967, filed.
Sept. 21	Certificate of filing (on September 20, 1967) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S. C. No. 638, O.T. 1967).
Sept. 26	Notice of filing (On September 20, 1967) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S. C. No. 638, O.T. 1967).
1968	
Feb. 2	Certified copy of order (dated January 29, 1968) granting petition for writ of certiorari and placing case on summary calendar, etc., filed. (S. C. No. 638, O.T. 1967).

Petition to Review

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

CHENG FAN KWOK (A15 355 927),

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

TO THE HONORABLE JUDGES FOR THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

Your petitioner, by his attorneys, alleges:

1. That the United States Court of Appeals for the Third Circuit has jurisdiction of this petition under the provisions of Public Law 87-301, 8 U. S. C. 1105(a).

2. That the petitioner resides in Newark, New Jersey, and is within the jurisdiction of this Court.

3. That the respondent herein has his office within the jurisdiction of the United States Court of Appeals for the Third Circuit.

4. That the petitioner is a native and citizen of the Republic of China. Petitioner has continuously resided in the United States since November 24, 1965, when he entered the United States at the Port of San Pedro, California.

5. That the petitioner submitted an application to the respondent asking that he be classified as a refugee pursuant to Section 203(a)(7) of the Immigration and Nationality Act of 1952, as amended, in that, he is a refugee from a Communist-dominated country, to wit: the Mainland of China. That the reason he submitted the application to the District Director in New Jersey is that, upon information and belief, there is no procedure for filing such an application in Hong Kong. That the petitioner submitted an application for a stay of deportation so that he may have his application under Section 203(a)(7) of the Immigration and Nationality Act considered in the United States. That this application for a stay of deportation was denied. That a copy of this order is annexed hereto.

6. That the denial was arbitrary, capricious, and an abuse of administrative discretion, illegal and in violation of law.

7. That the petitioner will be adversely affected because, if he is returned to Hong Kong, he will not be able to make an application as a refugee pursuant to Section 203 (a)(7) of the Immigration and Nationality Act and, therefore, would not be able to return to the United States.

8. That the petitioner has fully and completely exhausted each and every one of his administrative remedies and must seek direct recourse to the Court to declare the Acts and Regulations of the respondent illegal in denying the petitioner the right to have his classification as a refugee

determined in the United States pursuant to Section 203 (a)(7) of the Immigration and Nationality Act of 1952, as amended.

9. That no previous application has been made to this or any other court for the relief requested herein.

WHEREFORE, your petitioner respectfully prays that the order of the respondent be cancelled and that the petitioner be granted a stay of deportation pending a determination of his classification as a refugee pursuant to Section 203 (a)(7) of the Immigration and Nationality Act of 1952, as amended.

Respectfully submitted,

LEBENKOFF & COVEN
Attorneys for Petitioner
33 West 42nd Street
New York, N. Y. 10036

Order Denying Stay of Deportation

A15 355 927 DB

1060 Broad Street
Newark, New Jersey 07102

June 20, 1966

Mr. Cheng Fan Kwok
186 Mulberry Street
Newark, New Jersey

Dear Sir:

Reference is made to your "Application for Stay of Deportation" (Form I-246) submitted this date in which you request a stay of deportation to permit the submission of an application for adjustment of your immigration status pursuant to Section 203(a)(7) of the Immigration and Nationality Act.

Published regulations of this Service require that "the provisions of Section 245 of the Act shall govern the adjustment of status provided for in the proviso to Section 203(a)(7) of the Act". Section 245 of the Immigration and Nationality Act is not available to aliens who gained entry into the United States as crewmen. Consequently, you are ineligible to apply for adjustment of status in the United States.

Order Denying Stay of Deportation

In view of the foregoing your request for a stay of deportation is denied.

Sincerely,

W. J. Wyrsch
Acting District Director

(Initials Illegible)

cc: Jules E. Coven, Esquire
33 West 42nd Street
New York, New York

Application for Stay of Deportation

(See opposite) ☞

Form approved.
Budget Bureau No. 43-R402.2

United States Department of Justice
Immigration and Naturalization Service

APPLICATION FOR STAY OF DEPORTATION

SUBMIT IN DUPLICATE
Read instructions on reverse before filling out application

Fee Stamp

RECEIVED
1966 JUN 20 PM 4:17
I&NS, NEWARK, N.J.

File No. A15 355 927

Date June 20, 1966

1. Name (Family Name in Capital letters)	(First Name)	(Middle Name)
CHENG	FAN	KWOK

2. Present Address (Apt. No.) (Number and Street) (Town or City) (State) (Zip Code)

186 Mulberry Street, Newark, New Jersey

3. Country of Citizenship	4. Date to which passport is valid (Attach passport)
China	
5. Country to which deportation has been ordered	6. Date to which stay of deportation is requested
Hong Kong	pending determination of classification as a refugee pursuant to Section 203(a)(7).

7. Reasons for requesting stay of deportation:

I hereby request a stay of deportation pending a determination of my classification as a refugee pursuant to Section 203(a)(7) of the Immigration and Nationality Act. I do not believe that I can make this application for classification in Hong Kong where I am to be deported to. Since I fled from a Communist-dominated country, to wit: the Mainland of China, I feel I am eligible to be classified as a refugee. I will depart from the United States as soon as my classification is determined.

8. I certify that all the statements I have made in this application are true and correct to the best of my knowledge and belief.

Chung Jan Kwok (Signature of Applicant) — New York, N.Y. (Dated at) — June 20, 1966 (Date)

9. SIGNATURE OF PERSON PREPARING FORM, IF OTHER THAN APPLICANT

I declare that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge.

(Signature) (Address) (Date)

APPLICANT: DO NOT WRITE BELOW THIS LINE

Stay denied/granted until _____ by W. J. Weyrich

FORM I-246 (Rev. 11-30-64)

98

FORM APPROVED.
BUDGET BUREAU NO. 43-R427.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

APPLICATION FOR CLASSIFICATION AS A REFUGEE

(Under the proviso to Section 203(a)(7), Immigration and Nationality Act as amended)

File No. A15 355 927

APPLICANT TO FURNISH THE FOLLOWING INFORMATION (*SEE INSTRUCTIONS ON REVERSE*)

TYPE OR PRINT

1. My name is:	First	Middle	Last
	FAN	KWOK	CHENG

2. I reside in the United States at: (Apt. No.) (No. and Street) (City) (State) (ZIP Code)
186 Mulberry Street, Newark, New Jersey

3. I was born in: (City or Town) (Province) (Country)
Foochow — China

4. I am:
- [X] Male
- [ ] Female

Marital status:
- [ ] Single
- [X] Married
- [ ] Divorced
- [ ] Widowed

5. My Father's name and address is:
Ting Kwong, Deceased

6. My Mother's name and address is:
Lam Yuk, Deceased

7. My spouse resides at: (City or Town) (Province or State) (Country)
Hong Kong — B.C.C.

8. Date married: 1942
Place married: (City or Town) Foochow (Province or State) (Country) China

9. I fled or was displaced from (Name of Country) on or about (month) (day) (year) for the following reasons (state in detail):
I fled from the Mainland of China in 1956 because the Communists took control of that country and I am unwilling to return to a country that is Communist-dominated.

10. I am unwilling or unable to return to the country from which I fled or was displaced because: Reasons: (State in detail).
I am ant-Communist and I do not wish to live in a Communist-dominated country.

11. In the spaces below, list all of your entries into and departures from the United States. (Show your last entry FIRST.)

ENTRIES		DEPARTURES	
DATE	PORT	DATE	PORT
Nov. 24, 1965	San Pedro, Calif.		
(2 prior entries)			

Form I-590 A
(1-25-66)

10a

12. I ☐ have ☐ have not been absent from the United States during the past two years.

Clang Jun Kuok
(Signature of Applicant)

June 20, 1966
(Date of Signature)

Signature of person preparing form, if other than applicant.	Address of person preparing form, if other than applicant
I declare that this document was prepared by me at the request of applicant and is based on all information of which I have any knowledge.	Occupation:

DO NOT WRITE BELOW THIS LINE

INTERVIEWED ON DATE: AT:	☐ APPROVED. IMMIGRANT VISA NUMBER IS ALLOCATED TO APPLICANT PURSUANT TO THE PROVISO TO SECTION 203(a)(7), IMMIGRATION AND NATIONALITY ACT, AS AMENDED. ☐ DISAPPROVED BECAUSE
Immigration Officer	Date / District Director

INSTRUCTIONS

This form must be executed, signed and submitted in one copy with your Application for Status as a Permanent Resident, Form I-485, if you are claiming preference classification as a refugee. A separate form must be submitted for each member of your family who is claiming such classification. The form shall be executed by the parent or guardian of a child under 14 years of age.

1. INTERVIEW - The person who executes this form will be required to appear for an interview before an an immigration officer. The interview may be waived in the case of a child under 14 years of age.

2. PENALTIES - Severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact or using any false document in the submission of this application.

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PAGE

Decision of the Special Inquiry Officer

File No. A15 355 927

UNITED STATES OF AMERICA:

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

In Deportation Proceedings Under Section 242
of the Immigration and Nationality Act

In the Matter of

CHENG FAN KWOK,

Respondent.

The above-named respondent having appeared before me for hearing on this date, pursuant to the Order to Show Cause in this proceeding, and having admitted that the factual allegations contained therein are true, and having further admitted that (s)he is deportable from the United States on the charges set forth therein, I am satisfied and have concluded that deportability has been thereby established.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government within such time and under such conditions as the district director shall direct.

Decision of the Special Inquiry Officer

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States to Hong Kong on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondent into its territory, the respondent shall be deported to Rep. of China (on Taiwan).

WILLIAM TAFFET
(Special Inquiry Officer)

Date: 3/3/66

Place: Newark, N. J.

Copy of this decision has been served on the respondent.

Appeal: reserved

Time expires 3/14/66.

WILLIAM TAFFET
(Special Inquiry Officer)

Order Dismissing Appeal by Board of Immigration Appeals

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

Apr 5 1966

File: A-15355927—Newark

In re: CHENG FAN KWOK

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Jules E. Coven, Esq.
Lebenkoff & Coven
33 West 42nd Street
New York, N. Y. 10036

CHARGES:

Order: Section 241(a)(2), I&N Act (8 USC 1251 (a)(2))—Nonimmigrant crewman—remained longer

Lodged: None

APPLICATION: Voluntary departure

This case relates to a native of China and a citizen of the Republic of China, age 47, who has resided in the United States since his arrival at San Pedro, California, on or about November 24, 1965, as a crewman authorized to remain in the United States as long as the vessel on

which he arrived remained in port, but in no event to exceed 29 days. The respondent has remained in the United States without authority since at least December 24, 1965.

The respondent's deportability was conceded through counsel. The special inquiry officer, by order dated March 3, 1966, granted respondent the privilege of voluntary departure and further ordered that if the respondent failed to depart when and as required, that the privilege of voluntary departure should be withdrawn without further notice or proceedings and the respondent be deported to Hong Kong on the charge contained in the Order to Show Cause, and alternatively to the Republic of China on Taiwan. The respondent's wife and four children now reside in Hong Kong.

Despite conceding deportability, the respondent's counsel on appeal contends that the special inquiry officer had no authority to designate "a country of deportation" since he does not have the power to do so. It was further contended that the enabling regulations 8 CFR 242.8 and 8 CFR 242.18(c) are in violation of law in that they give the special inquiry officer more power than he is permitted to have pursuant to Section 242(b) of the Immigration and Nationality Act.

Counsel's argument has heretofore been rejected. Accordingly, the appeal will be dismissed and the order of the special inquiry officer affirmed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

THOS. S. FINUCANE
Chairman

Demand for Surrender of Alien

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

1060 Broad Street
Newark, New Jersey 07102

File: A15 355 927 DB

Date: June 16, 1966

Stuyvesant Insurance Company
786 Broad Street
Newark, New Jersey

Re: CHENG FAN KWOK

Gentlemen:

Pursuant to the terms of the bond posted by you for the release from custody of the above-named alien(s), demand is hereby made upon you to surrender such alien(s):

☐ for hearing at the following time and place.

Time: Place:

☐ into the custody of an officer of this Service at 1060 Broad Street, Newark, New Jersey—Room 460 on June 20, 1966 at 8:30 AM for deportation.

You are informed that failure to surrender the alien(s) in accordance with this demand will result in steps being

taken toward the breaching of the above mentioned bond and its forfeiture to the Government.

cc: Mr. Cheng Fan Kwok
186 Mulberry Street
Newark, New Jersey

Jules E. Coven, Esq.
33 West 42nd Street
New York, New York

Very truly yours,

DOMINICK F. RINALDI
District Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,005

CHENG FAN KWOK (A15 355 927),

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition to Review Decision of the Immigration and Naturalization Service

Present:

STALEY, *Chief Judge,* and
KALODNER and SMITH, *Circuit Judges.*

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the petition for review of the decision of June 20, 1966 of the Immigration and Naturalization Service in this case be, and the same is hereby dismissed for lack of jurisdiction.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

August 4, 1967

Opinion of the Court of Appeals, Third Circuit

(Filed August 4, 1967)

By STALEY, *Chief Judge.*

These proceedings were commenced in this court to review decisions of the district director of the Immigration and Naturalization Service in Newark, New Jersey. The district director had denied petitioners' applications for stays of deportation pending disposition of their applications for adjustment of status pursuant to §203(a)(7) of the Immigration and Nationality Act (hereinafter referred to as the "Act"), 8 U. S. C. §1153(a)(7) (Supp. II, 1966).

The petitioner in No. 16027, Chan Kwan Chung, a citizen of China, entered the United States on March 29, 1964. As a crewman, he could remain in this country only as long as his vessel was in port but not in excess of 29 days. 8 U. S. C. §1282(a). He remained longer than permitted, and deportation proceedings were commenced against him in July of 1964.[1] Chung apparently conceded his deportability but sought permission to depart voluntarily. His request was denied. No appeal was lodged with the Board of Immigration Appeals.

Chung was ordered to surrender for deportation to Hong Kong on July 7, 1966. On July 5, two days before he

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[1] The facts in the Kwok case, No. 16005, are similar: Cheng Fan Kwok, a citizen of China, entered the United States as a crewman on November 24, 1965. He was ordered deported on May 16, 1966, and was granted permission to depart voluntarily. He did not depart voluntarily and was ordered to surrender for deportation on June 20, 1966. On that date, he filed an application with the district director for a stay of deportation pending the submission of an application for adjustment of status under §203(a)(7). The application for a stay was denied.

was to be deported, he filed an application for a stay of deportation with the district director in Newark. The reason asserted for the stay was to permit him time to submit an application for adjustment of status pursuant to a recent amendment to the Immigration and Nationality Act, §203(a)(7). The district director denied the application, stating that under the published regulations of the Service, 8 C. F. R. §245.4, adjustment of status under §203(a)(7) is governed by §245 and that crewmen are excluded from adjusting their status under §245.

Two issues are presented by these petitions for review. The first is whether this court has jurisdiction to entertain the petitions, and the second is whether crewmen are eligible to adjust their status under §203(a)(7). We deal first with the question of jurisdiction since a decision on this point adverse to the petitioners would render unnecessary a consideration of the merits of each petition.

Both the petitioners and the Immigration and Naturalization Service urge that this court has exclusive jurisdiction to review the district director's decisions. Our earlier decisions to the contrary in Lam Man Chi v. Bauchard, 314 F. 2d 664 (C. A. 3, 1963), and Scalzo v. Hurney, 314 F. 2d 675 (C. A. 3, 1963), should not be accorded any weight in light of our reliance on and the subsequent reversal of the Second Circuit case of Foti v. INS, 308 F. 2d 779 (1962), *rev'd*, 375 U. S. 217 (1963). The statute, §106(a) of the Act, which confers jurisdiction on the courts of appeals to review orders of deportation and exclusion provides:

> "The procedure prescribed by, and all the provisions of sections 1031-1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the

> judicial review of all final orders of deportation * * * made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [§242(b) of the Act] or comparable provisions of any prior Act * * *." 8 U. S. C. §1105a(a).

The question before the Supreme Court in the *Foti* case was whether a denial of discretionary relief under §244(a)(5) of the Act (suspension of deportation) was a "final order of deportation" within the meaning of §106(a). Premising its conclusion on the legislative history of §106(a) and its purpose, the Court held that the denial of §244(a)(5) relief was reviewable in the court of appeals. The Court said that the purpose of §106(a) was to "abbreviate the process of judicial review" by creating " 'a single separate, statutory form of judicial review of administrative orders for the deportation of * * * aliens.' " 375 U. S. at 224-25. The Court also noted that Congressmen knowledgeable in immigration matters had stated in debate that a final order of deportation should include ancillary determinations such as applications for discretionary relief which were made in the same proceeding. Finally, the Court concluded that bifurcation of judicial review—review of the deportation order in the court of appeals and review of the denial of discretionary relief in the district court—was wholly inimical to the purpose of legislative history of the statute.

Though the Supreme Court in *Foti* placed considerable reliance on the fact that applications for discretionary relief are traditionally tried in one and the same proceeding with the rule to show cause why the alien should not be deported, it admitted that in a large percentage of cases deportability is conceded and that the only question before

the special inquiry officer is whether the application for discretionary relief should be granted. The Court also mentioned the other types of applications for discretionary relief, in addition to those under §244(a)(5), which would be reviewable in the courts of appeals:

> "* * * [I]t seems rather clear that all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure pursuant to §244(e) and orders denying the withholding of deportation under §243(h), are likewise included within the ambit of exclusive jurisdiction of the Courts of Appeals under §106(a)." 375 U. S. at 229.

The Court left open the question of whether the denial of a motion to reopen the deportation proceedings is reviewable by the court of appeals. It subsequently decided that question in the affirmative in a per curiam opinion. Giova v. Rosenberg, 379 U. S. 18 (1964), *reversing* 308 F. 2d 347 (C. A. 9, 1962).

Since *Foti* and *Giova,* there have been a number of decisions in the courts of appeals and the district courts dealing with the jurisdictional reach of §106(a). The Seventh Circuit has adhered to its pre-*Foti* decisions of Blagiac v. Flagg, 304 F. 2d 623 (C. A. 7, 1962), and Roumeliotis v. INS, 304 F. 2d 453 (C. A. 7), *cert. denied,* 371 U. S. 921 (1962), which hold that any administrative determination that involves the execution or suspension of the deportation order is ancillary to that order and is reviewable in the court of appeals. Melone v. INS, 355 F. 2d 533 (C. A. 7,

1966); Skiftos v. INS, 332 F. 2d 203 (C. A. 7, 1964). The Sixth Circuit also appears to have adopted that construction of the Act. Talavera v. Pederson, 334 F. 2d 52 (C. A. 6, 1964). The Seventh Circuit's position has, however, been rejected by the Fifth, Eighth and Second Circuits. Samala v. INS, 336 F. 2d 7 (C. A. 5, 1964); Mendez v. Major, 340 F. 2d 128 (C. A. 8, 1965); Tai Mui v. Esperdy, 371 F. 2d 772 (C. A. 2, 1966), *cert. denied*, —— U. S. —— (1967).[2]

Conflicting interpretations of §106(a) in the lower courts is exemplified by the division within one district court in this circuit. Judge Coolahan of the district court in New Jersey has held in Cheng Ho Mui v. Rinaldi, 262 F. Supp. 258 (D. N. J. 1966), that jurisdiction to review a district director's denial of a stay of deportation is in the district court rather than in the court of appeals. In so holding, he rejected the position taken by two of his colleagues in Wu Chun Hin v. Rinaldi, No. 402-66 (D. N. J., 1966), and Lam Ying Kwan v. Rinaldi, No. 483-66 (D. N. J., 1966).

We agree with the decision of Judge Coolahan and the position advanced by the Fifth, Eighth and Second Circuits. We do not believe that Congress by enacting §106 (a) or the Supreme Court by construing that section liberally intended that all administrative decisions affecting the deportation of an alien should be reviewable directly and exclusively in the court of appeals. If the Supreme Court had intended that interpretation, it could have so stated in the *Foti* case; but it did not.[3]

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[2] The Ninth Circuit cases appear to be conflicting. *Compare* Fong v. INS, 308 F.2d 191 (C.A. 9, 1962), *with* Holz v. INS, 309 F.2d 452 (C.A. 9, 1962).

[3] The Court noted the conflict among the circuits but did not cite any case with approval. 375 U. S. at 220 & n. 3.

What the court did in the *Foti* case was to place primary reliance on the function of the special inquiry officer to determine both the question of deportation and the availability of discretionary relief. The Court specifically noted those denials of discretionary relief which would be reviewable in the courts of appeals; and, in a footnote, the Court made, what is for us, the most telling distinction between what is reviewable here and what is not:

> "When §106(a) was enacted, the withholding of deportation under §243(h) was *a matter determined by an official other than the special inquiry officer* conducting the deportation hearing * * *. Under revised and currently effective regulations, * * * the decision on any §243(h) request for relief which the alien might wish to make [is] * * * effected in the deportation proceedings and reflected in the final order of deportation. While *presumably denials of §243(h) relief were not covered by §106(a) at the time of its enactment,* it does not seem incongruous to assume that such orders, because of the change in administrative regulations making such decisions *an integral part of the deportation proceedings conducted by a special inquiry officer,* are now within the reach of §106(a)'s judicial review provisions." 375 U. S. at 230 & n. 16 (Emphasis supplied).

Gleaned from the above, the sole determinants of review are whether the administrative decision was made by the special inquiry officer and was an integral part of the deportation proceedings conducted by him. The result in *Giova* is completely consistent with our analysis of *Foti* since motions to reopen are addressed to the special in-

quiry officer, 8 C. F. R. §§242.22, 103.5, and are part of the deportation proceedings.[4] It is therefore clear that we have no jurisdiction to review the district director's denial of petitioners' applications for stays.

Parenthetically, we note that to adopt the position urged upon us by the parties would provide a broader scope of judicial review of administrative determinations in immigration and naturalization matters than prevails in any other area of governmental administrative action. While it cannot be disputed that the purpose of §106(a) was to prevent dilatory tactics frequently employed by counsel for aliens to postpone the inevitable (deportation) as long as possible, we cannot believe that to achieve this end all administrative action affecting deportation, regardless of the official responsible for it, is reviewable exclusively by this court. To say that the denial of a stay by a district director must be reviewed by this court when the regulations, 8 C. F. R., §243.4, prohibit appeal within the Service itself, is absurd. Finally, we can only add our concurrence to the Second Circuit's conclusion that new legislation is necessary to rescue the courts and lawyers from these fruitless jurisdictional disputes. Tai Mui v. Esperdy, 371 F. 2d 778 & n. 3.

The petitions will be dismissed for lack of jurisdiction.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[4] See Lee v. INS, 375 F.2d 723 (C.A. 9, 1967), where the court of appeals had jurisdiction to consider the merits of a case identical with the Chung case presently before us. There, the appeal arose out of a denial of a motion to reopen. See also Tai Mui v. Esperdy, 371 F.2d 772.